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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

Docket No. 71-626

PHILIP E. GORDON,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

SUPPLEMENTAL APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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Adams Press Corp., 11 Commerce Street, Newark, N. J.—Market 3-0611-12

Order Denying Petition for Rehearing

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 71-1163

UNITED STATES OF AMERICA,

v.

HUGH J. ADDONIZIO, RUGGIERO A. BOIARDO, JR., ANTHONY LA MORTE, MARIO GALLO, JOSEPH BIANCONE, RALPH VICARO, NORMAN N. SCHIFF, PHILIP GORDON, BENJAMIN KRUSCH, FRANK ADDONIZIO, LEE BERNSTEIN, JAMES CALLAGHAN, CALVIN D. WEST, ANTHONY GIULIANO, IRVINE I. TURNER

PHILIP GORDON,

Appellant.

SUR PETITION FOR REHEARING

Present: Chief Judge Seitz, Judge Staley, Judge Van Dusen, Judge Aldisert, Judge Adams, Judge Rosenn, *Circuit Judges,* Judge Garth, *District Judge*

The petition for rehearing filed by Philip Gordon in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in

regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

ARLIN M. ADAMS
Judge

Dated: November 3, 1971

No. 71-[illegible]

In the Supreme Court of the United States

OCTOBER TERM, 1971

PHILIP E. GORDON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE [illegible] CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,
Department of Justice,
Washington, D.C. 20530

In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-626

PHILIP E. GORDON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial in the United States District Court for the District of New Jersey, petitioner, together with various co-defendants, was convicted on one count of conspiracy to violate, and sixty-three substantive violations of, the Hobbs Act, 18 U.S.C. 1951. On January 27, 1971, he was sentenced to three years' imprisonment. The court of appeals affirmed *per curiam* (Pet. App. A).

The evidence is summarized in the opinion below and is set forth in detail in the companion case of *United States* v. *Addonizio, et al.*, C.A. 3, Nos. 19,295, 19,391-19,393, decided September 16, 1971, presently pending on petition for certiorari, No. 71-744, this Term

(see Appendix A to the *Addonizio* petition at pp. 3a–11a). It showed that between 1964 and 1969, in Newark, New Jersey, contractors were engaged in two large-scale construction projects for the city, and that these projects were closely connected with interstate commerce. During this period, contractors doing business with the city were required to "kick back" ten percent of the payments they received from the city. This money went to the Mayor, City Councilmen and municipal officials. Petitioner was a member of the City Council.

Co-defendant Boiardo demanded that one Rigo, a contractor, make ten percent payments for the benefit of city officials. After initially refusing, Rigo was told by Boiardo that he either would have to pay or not work in Newark. Rigo then agreed to pay; he began to work and to make payments to the conspirators, but after three months he still had received no money from the city. When Rigo complained to the Mayor, he was told that the City Council controlled payments. The Mayor advised Rigo to see Boiardo if he wanted "to move" the matter of payments. Subsequently Rigo saw Boiardo and, in order to obtain the payments, made further concessions[1] following threats of economic and personal injury. Rigo made some payments to Boiardo, but later was requested to pay the councilmen directly. He did so, including twelve payments to petitioner.

1. Petitioner contends (Pet. 19–30) that the evidence failed to establish that he had any knowledge

[1] Rigo agreed to collect for the conspirators the "kickback payments" of certain other contractors.

that his co-conspirators resorted to threats of financial injury to induce payments by Rigo; he claims that his alleged ignorance of their extortive methods requires reversal of his conviction on the conspiracy count.[2] Petitioner, however, clearly had knowledge of the common objective of the Mayor and City Councilmen to obtain "kickbacks" from city contractors and to share the money amongst themselves; indeed, he not only personally received money from a city contractor, knowing such receipt was a crime (Pet. 13–14), but he also served as a conduit for such payments to be made to another councilman (Pet. App. 3a–4a; Pet. 8–12). As the court of appeals properly held (Pet. App. 4a), petitioner's knowledge that extortion was the source of the illegal monies could be inferred, since it was reasonably foreseeable that city contractors would not voluntarily pay ten percent "kickbacks" and that some coercive means of implementation would have to be used. This was sufficient for conviction; knowledge of the details surrounding the extortionate means employed by his co-conspirators was not required. *Blumenthal* v. *United States,* 332 U.S. 539, 556–557.

2. The trial judge refused a defense request to instruct on the differences between bribery and extortion, but did instruct that the extortive conduct required for conviction under 18 U.S.C. 1951 did not encompass mere voluntary payments by the victim (Pet. 30–31). Petitioner's contention that this instruction

[2] This, in turn, would necessitate reversal of many of the substantive counts under *Pinkerton* v. *United States*, 328 U.S. 640, 646. See Pet. App. 5a.

was inadequate (Pet. 30–32) is unsound; it is based on an apparent belief that, from the evidence, an inference might be made that Rigo had voluntarily initiated the payments to the City Council without thought of "fear of financial injury" (see Pet. 23–24). But, Rigo had testified without contradiction that monies were paid in response to extortionate demands on behalf of the city administration. Thus, bribery, which involves voluntary payments, was not a real possibility under the evidence before the jury. In any event, the court's instruction adequately advised the jury on the matter of involuntariness of payment as an essential element of the crime, and thus it presents no cause for review by this Court.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

DECEMBER 1971.